Filed 7/11/19 P. v. Mabullu CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID TARNUE MABULLU, JR., Defendant and Appellant.	A151363 (Alameda County Super. Ct. No. 468291)

Defendant David Tarnue Mabullu, Jr. appeals a judgment entered upon a jury verdict finding him guilty of two counts of rape, dissuading a witness, and domestic battery, and finding true "one strike" allegations that defendant kidnapped the victim and used a deadly weapon in connection with one of the rape counts. He contends the trial court did not instruct the jury fully on the one strike kidnapping allegation, improperly admitted hearsay under the fresh complaint doctrine, and committed sentencing error. We shall order the trial court to correct a sentencing error and two clerical errors and to recalculate the amount of restitution, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Domestic Violence Between Defendant and Jane Doe

The victim of the rapes, Jane Doe, was in a romantic relationship with defendant for approximately four years, beginning in 2012, when she was 19 years old. About a year after their relationship began, defendant began physically assaulting Doe. The first incident occurred after she took his phone while he was sleeping, looked at his text

messages, and learned that he was cheating on her with another woman, P.T. Doe confronted defendant, and he punched her in the face, kicked her, and threw her against a closet door, causing a cut inside her lip and a black eye. Doe briefly ended their relationship, but took defendant back because she loved him and believed him when he said he was sorry.

Doe found out in 2014 or 2015 that defendant was involved with a second woman, M.P. Doe was not involved with any other men during her relationship with defendant. Nevertheless, defendant was jealous and controlling toward Doe; she had to ask him for permission to go anywhere, such as the store or the gym, and wait at home until he answered her.

In February 2016, defendant was arrested for domestic violence against P.T. He asked Doe to write a letter to the court on his behalf. She refused, and he beat her until she agreed to write the letter, in which she stated falsely that he had never been violent toward her.

Sometime during the spring of 2016, defendant called Doe while she was at work, but she did not hear because her cellphone's ringer was off while she was working. She called him when she got home and apologized for not answering his calls. He came to her house half an hour later, slapped her, ripped off her top, took her phone, and threw it against the wall, cracking it.

On Doe's birthday, May 9, 2016, she was excited and repeatedly asked defendant what he had planned for her. He became angry, punched her, kicked her, and spat on her, telling her he did not care that it was her birthday. She blamed herself for being too excited and being a nuisance to him. This incident was the basis for one of the crimes alleged against defendant.

Doe learned she was pregnant by defendant at the beginning of June 2016. Defendant initially seemed happy, but the next day, Doe woke up to find him punching her in the stomach and telling her he hoped she would have a miscarriage. Later in June, about a week before the rapes charged in this case, defendant again punched Doe in the stomach "as hard as he could," tackling her as she tried to guard herself. The assault

caused some bleeding, and she went to the emergency room on June 21, 2016. This incident was the basis for one of the crimes of which defendant was convicted.

By the end of June 2016, defendant and Doe had ended their relationship, although she still told him about her medical appointments.

Doe's mother testified that during Doe's relationship with defendant, she sometimes saw injuries on Doe, such as black eyes, a "busted" lip, and marks on her arms. She took pictures of some of the injuries.

II. Events of June 26 and June 27, 2016

On the evening of June 26, 2016, defendant called Doe while she was at work, at about 10:00 or 10:30 p.m., and asked her to come to his house and have sexual relations. She told him no and he began to curse at her, telling her he did not want anything to do with her other than to have sex with her. Doe hung up her phone and turned it off.

Doe's work shift ended at 11:30 that evening. As she left the building she saw a car outside. Defendant jumped out of the car and approached her, yelling at her and telling her she was not going to control anything. Doe had a bottle of Gatorade and some iced tea in her hand; he took the ice tea and poured it on her top, telling her something like, "That's what I think of you." He told her to give him her phone and keys and get into the car so she would not make a scene. He was very angry and his eyes were "piercing" and dark, the way he looked every time he became violent. Doe got into the car—which she recognized as belonging to defendant's mother—because she was frightened, although she told defendant she did not want to do so.

Defendant got into the driver's seat and drove away. He yelled at her, telling her she didn't have control over anything and saying something about child support. Doe told him she was tired, she wanted to go home, and she did not want to be with him. As they drove, he took the bottle of Gatorade and hit her in the eye with it, then hit her multiple times with his open hand and fist as they drove on the freeway. Doe held up her hand to try to block the blows, asked him to stop, and begged him to take her home. Instead, defendant took her to his own home.

When they got there, defendant told her to go into the apartment and greet his mother, who was in the kitchen. Defendant's mother mentioned that something was wrong with Doe's face, and defendant told his mother to shut up and told Doe to go to his room, which she did. Defendant closed the bedroom door and told Doe to take her clothes off. She began to cry and told him she just wanted to go home. He pulled out a metal baton that he used in his work as a security officer, pointed it at her, told her to take her clothes off, and counted down from five. Doe begged him not to hit her with the baton, and he said he would not hit her if she took her clothes off. Doe was afraid, because defendant had hit her with the baton in the past and left a painful bruise. Defendant counted down from five again, and Doe began to remove her clothes. She tried to push defendant down so she could run to the door. He threw her to the floor, pinned her down, put his knees on her inner thighs, with his forearm to her throat, and had intercourse with her against her will. She was crying and kept asking him to stop. She tried to scream, but defendant hit her.

After defendant ejaculated, Doe tried to put her clothes back on, and they fought for her clothes. Defendant then raped her again, pinning her to the floor with his knees and forearm. Afterward, he took her clothes, lay down on them, and fell asleep.

The next morning, defendant gave Doe her clothes and her phone and keys, which he had hidden in his shoe. He told her he was done with her.

Doe left the apartment, called her mother, and asked her to pick her up at a McDonald's. Doe crouched down to keep out of sight until her mother arrived. Her mother asked why Doe's face was swollen, and Doe told her mother what had happened. She was crying and disheveled. After they picked up Doe's car from her workplace, Doe called the police.

A sexual assault examination revealed swelling on Doe's forehead; a bruise on her buttock; and redness, swelling, and tenderness on her genitals that were consistent with sexual assault. The injuries could also be consistent with consensual sex.

III. The June 30, 2016 Incident

Doe was walking toward her car to go to work on June 30, 2016, three days after the events described above. The car was parked in a carport outside her home. As soon as she pressed the button to unlock her car, defendant appeared, emerging from a crouching stance under the car, a gun in his hand. Doe screamed, and defendant told her to get in the car because he was a fugitive. They got into the car, with Doe driving. When they saw a police officer, defendant told Doe not to flag him down. He argued with her, asking her why she had called the sheriff and reported the rape, and said she should tell the sheriff that her story had been a lie. She told him she would not do so, and he became angry and slapped the car's dashboard. Doe was frightened and told him she would drop the charges. She eventually dropped defendant off near his house.

IV. Prior Uncharged Domestic Abuse Against P.T.

The prosecution called P.T. as a witness. She was in a relationship with defendant, off and on, from approximately 2014 until some time in 2016. At about 4:30 on the afternoon of February 10, 2016, she was returning from work on the Bay Area Rapid Transit (BART). At trial, she testified that defendant had texted her to tell her he would meet her at the BART station to run errands. They got into an argument in the station's parking lot, and defendant physically pushed her, spat at her, grabbed her purse, threw it to the ground, kicked her wallet under the car, and called her inappropriate names. He tried to get her into his car. She was concerned because she knew defendant carried a gun. She spoke with the BART police about the incident and told them defendant had grabbed at her ribs and pushed her against the car.

Recording of P.T.'s 911 calls were played for the jury. She told the police dispatcher that defendant surprised her at the BART station. When police officers arrived, she told them defendant had confronted her in the parking lot, that his actions had exacerbated a pre-existing shoulder injury, and that she thought he was either going to beat her up or abduct her. She believed she needed an emergency protective order to keep defendant away from her.

V. Defendant's Version of Events

Defendant, who represented himself at trial, testified on his own behalf. He testified that he met P.T. at the BART station on February 10, 2016 because she had told him she might be pregnant and he wanted her to go to a drugstore to get a pregnancy test. They began arguing in the parking lot, and she told him he might not be the father. He became frustrated and he slapped her purse out of her hand and moved her to the side to get her into the car because he did not want to argue in the parking lot.

Defendant testified that before the June 27, 2016 incident, he and Doe had been arguing because of his involvement with other women. He picked Doe up from work on June 26 because she had a medical appointment the next morning. He said he "sweet-talked" Doe into the car, rather than forcing her or threatening her. When they got to his home, Doe was emotional because he had told her he did not want her to be the mother of his child. They had sex that night; he acknowledged that he had not asked her for consent, but said that in their relationship, sex was "just a thing that happened." They argued afterward, and she left after he told her she should get an abortion. She then came back and spent the night with him, leaving early the next morning.

VI. The Verdicts and Sentencing

The jury found defendant guilty of two counts of raping Doe on June 27, 2016 (Pen. Code, § 261, subd. (a)(2); counts 1 and 2.)[1] As to count 1, the jury found true allegations that defendant kidnapped the victim and the movement substantially increased the risk of harm to her (§ 667.61, subd. (d)(2)) and that he personally used a weapon in the commission of the offense (§ 667.61, subd. (e)(3)). The jury found those allegations not true as to count 2. It also found him guilty of dissuading a witness by force or threat on June 30 (§ 136.1, subds. (b)(3) & (c)(1); count 3), but not guilty of kidnapping Doe on that date (§ 207, subd. (a); count 4). It found him not guilty of misdemeanor domestic battery against Doe on May 9, 2016 (§ 243, subd. (e)(1); count 5), and guilty of domestic battery against her on June 21, 2016 (§ 243, subd. (e)(1); count 6).

[1] All undesignated statutory references are to the Penal Code.

The trial court sentenced defendant to the upper term of four years for count three (§ 136.1, subd. (c)(1)); a consecutive low term of three years for count 1, rape (§§ 261, subd. (a)(2) & 264, subd. (a)), with an additional 25 years to life for the kidnapping allegation (§ 667.61, subds. (a) & (d)(2)); and a consecutive low term of three years for count 2, rape (§§ 261, subd. (a)(2) & 264, subd. (a)), for a total prison term of 35 years to life.

DISCUSSION

I. Instruction on One Strike Kidnapping Allegation

Defendant contends the trial court failed to instruct the jury completely on the "one strike" allegation that he kidnapped Doe in connection with the rape counts. (§ 667.61, subd. (d)(2).) This statute "permits the imposition of an indeterminate 25-year-to-life sentence under these circumstances: . . . '[(d)](2) The defendant kidnapped the victim of the present offense and that movement of the victim substantially increased the risk of harm to the victim over and above the level of risk necessarily inherent in the underlying offense . . . .' The section 667.61, subdivision (d)(2) qualifying circumstance has two elements. The first element requires the victim be kidnapped. The second element requires that the victim's movement *substantially increase the risk of harm* to him or her above that level of danger necessarily inherent in the sex offense." (*People v. Adams* (2018) 28 Cal.App.5th 170, 189.) The trial court has a sua sponte duty to instruct regarding this qualifying circumstance when it is alleged. (*Id*. at p. 190; *People v. Jones*, (1997) 58 Cal.App.4th 693, 709.)

The trial court instructed the jury on kidnapping as follows: "Defendant is accused in Count 4 of having committed the crime of kidnapping, a violation of Section 207, subdivision (a) of the Penal Code. [¶] Every person who unlawfully compels any other person without her consent and because of a reasonable apprehension of harm, to move for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a). [¶] A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the

totality of the circumstances attending the movement, including, but not limited to the actual distance, or whether the movement increased the risk of harm above that which existed prior to the movement or decreased the likelihood of detection. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was unlawfully compelled to move because of a reasonable apprehension of harm; [¶] 2. The movement of the other person was without her consent. [¶] 3. The movement of the other person in distance was substantial in character." (CALJIC No. 9.50.)

The jury was next instructed: "The determination by you of whether a particular distance moved was substantial and increased the risk of harm to the alleged victim depends upon a consideration of the totality of the circumstances involved in this case. Whether the alleged victim's forced movement was merely incidental to the rapes is necessarily connected to whether it substantially increased the risk of harm to the alleged victim. Distance moved is simply one factor. No minimum distance is required so long as the movement is substantial. Other factors you should consider are the scope and nature of the movement, as well as the context of its environment, including but not limited to, whether the movement decreased the likelihood of detection, increased the danger inherent in an alleged victim's foreseeable attempts to escape, or enhanced the attacker's opportunity to commit other crimes." (CALJIC No. 9.50.1.) The trial court also instructed the jury that there was no kidnapping if one consented to accompany another "freely and voluntarily and not under the influence of threats, force, or duress" (CALJIC No. 9.56) and that a defendant did not have the general criminal intent necessary to a charge of kidnapping if he "entertained a reasonable and good faith belief that the person alleged to have been kidnapped voluntarily consented to accompany the defendant and to the movement involved in the purported kidnapping" (CALJIC No. 9.58).

Defendant contends these instructions were inadequate because they were directed only at the separate crime of kidnapping charged in count 4, rather than the kidnapping allegation in connection with the rape charges (counts 1 and 2), and that they did not contain all the factors necessary for the jury to resolve the issue.

It is well established that " ' "[t]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' [Citation.] ' "[T]he absence of an essential element in one instruction may sometimes be supplied by another." ' [Citation.] Furthermore, ' " ' "[j]urors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." ' " ' [Citations.] Consequently, '[i]n reviewing a claim of instructional error, the ultimate question is whether "there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner." ' " (*People v. Gana* (2015) 236 Cal.App.4th 598, 607-608.)

Although the instructions on kidnapping did not refer specifically to the one strike kidnapping allegation in connection with the rape counts, as a whole they adequately informed the jury of the applicable legal principles, and we conclude there is no possibility the jury was misled. The verdict form asked the jury whether it found "that the defendant . . . kidnap[ped] the victim of [forcible rape], and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the commission of that offense . . ." The instructions informed the jury of the findings it must make to determine whether defendant kidnapped Doe and how to resolve the question of whether the distance he moved her increased the risk of harm. There is no basis to conclude the jury did not understand these principles to apply to the kidnapping allegation. Defendant also argues that the instructions omitted the principle that his reasonable belief in Doe's consent would negate the mental state required for kidnapping. To the contrary, the instructions explained this principle explicitly to the jury.

Defendant suggests that a jury question during deliberations indicates it was confused about these legal principles. The jury asked: "Why are there two kidnaps, one for each rape? Why are there two weapons, one for each rape? We are unclear as to the application if necessary." It appears from the record that, with the consent of the parties, the court replied with language informing the jury that the question before it was whether " 'each allegation as to the separate act occurred in the commission of that separate act.' "

This question and response do not suggest the jury was confused about what it must find to determine whether defendant kidnapped Doe, but rather that it did not understand why the kidnapping allegation was made twice, once in connection with each rape count.

Thus, we conclude the instructions as a whole adequately informed the jury of the findings it must make in connection with the kidnapping allegations, and we reject defendant's contention that the trial court committed structural error on this point.[2]

II. Prior Acts of Domestic Violence

Defendant contends the trial court abused its discretion in admitting evidence of his prior acts of domestic violence against Doe and P.T.

Before trial, the prosecutor moved in limine to admit evidence of defendant's uncharged conduct against P.T. under Evidence Code section 1109 and 1101, subdivision (b),[3] and defendant filed a motion to exclude the evidence of that incident. The police report attached to defendant's motion indicated that P.T. had told a police officer that on the afternoon of the incident, she was breaking up with defendant over the phone. Defendant knew P.T.'s schedule, and he was waiting for her in the BART parking lot

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[2] Defendant suggests for the first time in his reply brief that CALJIC No. 9.50 is incorrect in requiring a "reasonable apprehension of harm," rather than the formulation used in CALCRIM No. 3175, which requires the "use of force or . . . instilling reasonable fear." He offers no argument or authority showing the CALJIC formulation is incorrect, stating merely that it is "not the same element" as the CALCRIM formulation. (See *People v. Dixon* (2007) 153 Cal.App.4th 985, 996 [points not supported by sufficient argument or authority deemed waived].) We reject his contention on the merits, while also noting we normally do not consider points raised for the first time in a reply brief. (*People v. Whitney* (2005) 129 Cal.App.4th 1287, 1298.)

[3] As we will discuss in greater detail below, Evidence Code section 1109 authorizes evidence that a defendant committed other domestic violence to show propensity to do so, if the evidence is not inadmissible under section 352 of that code. Evidence Code section 1101, subdivision (b) authorizes evidence of a defendant's other acts "to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

when she arrived after work. He tried to pull her into his car by her wrist, and she yelled "No," but managed to break free. During the struggle, some of her belongings fell, and as she reached down to pick up her wallet, defendant kicked it under the car. Defendant spat on her hair repeatedly.

The trial court ruled the evidence was admissible, concluding it was more probative than prejudicial. Specifically, the court found the evidence was "not particularly prejudicial in the sense the case law says I'm supposed to weigh prejudice," and that it was "especially probative" because defendant's actions in each case—meeting someone he knew on her way home from work, trying to make her come with him, and being fought off—showed a similar state of mind.

As we have discussed, the jury heard evidence of both the incident with P.T. and various acts of domestic violence defendant committed against Doe. The court instructed the jury it could consider evidence of uncharged domestic violence in connection with the kidnapping clauses of the two rape counts, as well as the kidnapping and domestic violence counts. The instruction told the jury: "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or a similar type offense. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused." (CALJIC No. 2.50.02.)

"Under Evidence Code section 1109, evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence. The trial court has discretion to exclude the evidence if its probative value is outweighed by a danger of undue prejudice or confusing the jury, or would result in an undue consumption of time. (Evid. Code, §§ 1109, subd. (a)(1), 352.)" (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.) The admissibility of evidence of domestic violence is entrusted to the sound discretion of the trial court, which we will not disturb on

appeal absent a showing of abuse of discretion. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

" ' "The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense." ' [Citation.] [Evidence Code] [s]ection 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.' [Citation.] Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation. [Citation.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the 'typically repetitive nature' of domestic violence. [Citations.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531-532, fns. omitted (*Johnson*).)

Applying these standards, we see no abuse of discretion in the trial court's ruling regarding the incident involving P.T. The incident described in the police report bore striking similarities to the June 26 kidnapping of Doe: in each case, the victim had recently ended her relationship with defendant, he knew her schedule, he waited outside as she returned from work, and he attempted to coerce her into his car. The trial court could properly conclude the evidence was relevant to defendant's intent. We see no risk of jury confusion, and the recounting of a single incident could not be expected to take excessive time. Nor did the trial court abuse its discretion in concluding the evidence was "not particularly prejudicial." P.T. did not suffer major injuries, and the conduct she described was less serious than the offenses with which defendant was charged.

Defendant also argues the trial court's ruling relied on the principles of Evidence Code section 1101, subdivision (b), which authorizes evidence of prior acts to prove, inter alia, intent, preparation, plan or absence of mistake—rather than propensity—and that the court failed to conduct a proper balancing test under this provision. On the contrary, as we have discussed, the court explicitly weighed the prejudicial effect of the incident with P.T. against its probative value.

Defendant further contends the trial court abused its discretion in allowing the prosecution to introduce evidence of his prior acts against Doe. He has forfeited this issue by failing to object to this evidence below. (See *People v. Hinton* (2006) 37 Cal.4th 839, 893; Evid. Code, § 353, subd. (a).) He argues that his motion to exclude evidence of the prior incident with P.T. encompassed evidence of prior incidents with Doe as well. We disagree. Both his written motion below and his argument before the trial court concerned only the incident with P.T.

In any case, even if the matter were properly before us, we would find no abuse of discretion. The uncharged acts of violence against Doe were part of a continuing pattern in her relationship with defendant (see *Johnson*, *supra*, 185 Cal.App.4th at p. 532); Doe described them relatively quickly; and, although reprehensible, they are less shocking than his charged actions of punching his pregnant former girlfriend in the stomach, causing bleeding, and of kidnapping and raping her.

III. Evidence of Doe's Statements to Her Mother

Before trial, the People moved in limine to introduce evidence that Doe reported the sexual assault to her mother shortly after she left defendant's home. The motion relied on the "fresh complaint" doctrine, which authorizes admission of evidence that the victim of a sexual offense disclosed the assault; the evidence is admissible "for a limited, nonhearsay purpose—namely, simply to establish that such a complaint was made—in order to forestall the trier of fact from inferring erroneously that no complaint was made, and from further concluding, as a result of that mistaken inference, that the victim in fact had not been sexually assaulted." (*People v. Brown* (1994) 8 Cal.4th 746, 748-749 (*Brown*).) Admission of such evidence should be "carefully limited to the fact that a complaint was made, and to the circumstances surrounding the making of the complaint." (*Id*. at p. 762.) "[A]dmission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule." (*Id*. at p. 760.) Evidence of the victim's statement regarding the nature of the offense and the identity of the offender is proper. (*People v. Burton* (1961) 55 Cal.2d 328, 351.)

At the hearing on the motions in limine, defendant opposed the motion on grounds of hearsay. The trial court explained that the fresh complaint doctrine was an exception to the rule against hearsay, and ruled that the People could introduce evidence that Doe told her mother about the sexual assault.

Doe's mother testified that early on the morning of June 27, 2016, Doe called her, said she needed her to come and pick her up, and told her she was at a mall. Doe sounded as if she had been crying. The trial court asked the prosecutor if he was offering the evidence "as exceptions to the hearsay rule, spontaneous declaration." The prosecutor replied, "That's correct," and the court allowed him to proceed. Doe's mother then testified that she went to a McDonald's restaurant to get Doe and saw her crouching under a window, and that Doe got into the car, crying, nervous, and disheveled. Doe told her mother that defendant had kidnapped her, that he told her to get in the car and not to cause a scene, that he took her to his house, told her to say hello to his mother, took her to his room, told her to take her clothes off and threatened to hit her with a stick, pushed her down, and raped her. Doe's mother went on to testify that when she saw a police officer, she told him Doe had been raped and was advised to make a police report, and that she and Doe drove together. The trial court interrupted the testimony, saying, "At this point we are beyond [f]resh [c]omplaint."

Defendant contends this testimony exceeded the bounds of the fresh complaint doctrine. He argues Doe's mother was improperly allowed to testify to the details of Doe's complaints, rather than simply to the fact that the complaint was made and the surrounding circumstances. (See *Brown*, *supra*, 8 Cal.4th at pp. 760, 762.) He also points out that Doe told her mother what had happened in response to Doe's mother's questioning, rather than simply volunteering the statements. (See *People v. Fair* (1988) 203 Cal.App.3d 1303, 1308 ["In order to qualify as a fresh complaint, the statements of the victim must have been volunteered within a reasonable time after the sex offense"]; but see *Brown, supra*, 8 Cal.4th at p. 763 [admissibility of fresh complaint evidence does not turn invariably on whether complaint was volunteered spontaneously or prompted by inquiry or questioning from another person].)

We will not reverse the judgment on this basis. Defendant does not challenge the trial court's original ruling—that evidence that Doe called her mother and reported she had been raped was admissible under the fresh complaint rule. To the extent Doe's mother's testimony went beyond the court's ruling, defendant forfeited the issue by failing to object at trial on this ground. (See Evid. Code, § 353, subd. (a) [no reversal based on erroneous admission of evidence absent objection, motion to exclude, or motion to strike].) Moreover, it appears that the trial court also relied on the spontaneous statement exception to the hearsay rule in allowing Doe's mother to testify as she did, and defendant does not argue this ruling was an abuse of discretion. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [when appellant fails to raise point, or fails to support it with reasoned argument and citations to authority, we treat it as waived].)

Defendant also argues the trial court neglected to instruct the jury that the "fresh complaint" evidence should be considered only for a limited nonhearsay purpose, not for the truth of Doe's statements. However, the court does not have the duty to give such an instruction in the absence of a request (*People v. Manning* (2008) 165 Cal.App.4th 870, 880), and defendant did not request a limiting instruction.

IV. Sentencing Error Regarding Count 1

A. Sentencing to Both Determinate and Indeterminate Terms

On count 1, the first rape count, the trial court sentenced defendant to the low term of three years, with an additional 25 years to life for the one strike kidnapping allegation, for a term of 28 years to life for that count. (§ 667.61, subds. (a) & (d)(2).) Defendant contends the trial court erred in imposing both the three-year term for rape and the 25-years-to-life term under the one strike law. The Attorney General agrees with defendant, as do we.

The one strike law (§ 667.61) authorizes the imposition of indeterminate terms for sex offenses committed under enumerated circumstances, among them a rape in connection with which the defendant kidnapped the victim and the movement substantially increased the risk of harm (§ 667.61, subd. (d)(2)), which carries a 25-year-

to-life term (§ 667.61, subd. (a)); and one in connection with which the defendant personally used a dangerous or deadly weapon (§ 661, subd. (e)(3)), which carries a 15-years-to-life term (§ 667.61, subd. (b)).[4]

The one strike law is not a sentencing enhancement, which adds an additional term of imprisonment to the base term; rather, it " 'sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the [statute's] conditions.' " (*People v. Acosta* (2002) 29 Cal.4th 105, 118-119; accord *People v. Mancebo* (2002) 27 Cal.4th 735, 741-742.) A defendant who is sentenced for a sex crime under the indeterminate one strike law may not *also* be sentenced under the determinate law for the underlying crime. (*People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343.) The trial court erred in imposing both a determinate three-year sentence for rape (§ 264) and an indeterminate sentence of 25-years-to-life under the one strike law. We shall order the three-year sentence stricken.

B. Clerical Errors

The prosecution's sentencing memorandum recommended that defendant be sentenced to consecutive terms of 25 years to life under the aggravated kidnapping circumstance of the one strike law (§ 667.61, subds. (a) & (d)(2)) and 15 years to life under the weapons circumstance (§ 667.61, subds. (b) & (e)(3)), for a total of 40 years to life under the one strike law. In response, defendant argued that section 667.61 authorized only one indeterminate term.

Before imposing sentence, the trial court explained it intended to impose 25 years to life for count 1, then stated, "It is my understanding that the defendant also has been

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[4] Section 667.61, subdivision (a) provides in pertinent part: "[A]ny person who is convicted of an offense specified in subdivision (c) [including rape] under one or more of the circumstances specified in subdivision (d) [including aggravated kidnapping] or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life."

Section 667.61, subdivision (b) provides in pertinent part: "Except as provided in subdivision (a) . . . , any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) [including personal use of a weapon] shall be punished by imprisonment in the state prison for 15 years to life."

convicted of the use of a weapon during the course of rape. . . . That carries 15 to life. The district attorney has recommended I start with 40 to life. The defense . . . has filed documents that include cases that sway me that I do not have the right to impose those consecutively, that I do not have the duty to do so. In other words, I cannot—if I am wrong and I have discretion, I would use the discretion not to do so in light of him getting 25 to life, a sentence equivalent to first-degree murder." The court imposed sentence as follows: "The [d]efendant on [c]ount 1 is sentenced to the low term but to the clause [*sic*] of 25 to life, for a total of 28 to life. It is possible I am wrong; prosecution is right. And an appellate court will determine that 15 to life should be added to that, but that's 28 to life."

As we read the transcript, the only sentence the trial court imposed under the one strike law was the 25-year-to-life term. However, the minutes of the sentencing hearing and the abstract of judgment both reflect a 25-year-to-life "enhancement" for count 1 under the one strike law (§ 667.61, subd. (d)(2)) *and* a concurrent 15-years-to-life "enhancement" under the same statute (§ 667.61, subd. (e)(3)). Defendant asks us to order the minute order and abstract of judgment amended to remedy the discrepancy.

It is well established that " '[c]onflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and resolved in favor of the reporter's transcript unless the particular circumstances dictate otherwise.' " (*In re P.A.* (2012) 211 Cal.App.4th 23, 30, fn. 4.) Nothing in the circumstances indicates the trial court intended to impose a concurrent sentence for the use of a weapon during the rape in count 1. The court stated explicitly that it was swayed by defendant's letter regarding sentencing, which argued that he could not be sentenced under both subdivision (a) and subdivision (b) of the one strike law.

Section 667.61 supports this conclusion. Subdivision (b) of that statute requires 15-year-to-life terms for specified offenses "[e]xcept as provided in subdivision (a) . . .," which sets a 25-year-to-life sentence for rape under more egregious circumstances, including aggravated kidnapping. Subdivision (f) of the same statute addresses sentencing when multiple aggravating circumstances are found true. It states that the

circumstances that "have been pled and proved . . . shall be used as the basis for imposing *the term provided in subdivision (a)[or] (b) . . . whichever is greater . . .*" (Italics added.) Read together, these provisions indicate the Legislature intended to authorize trial courts to impose only the greatest single sentence available under the one strike law, rather than multiple sentences for the same offense.

Because the trial court did not impose a concurrent 15-year-to-life term for count 1, we shall order the minute order from the sentencing hearing and the abstract of judgment corrected to strike the reference to such a term.

We note an additional clerical error that must be corrected. The amended information charged defendant in count 6 with misdemeanor battery of "JANE DOE, a person with whom defendant has a dating/engagement relationship" in violation of section 243, subdivision (e)(1). However, the verdict form erroneously identified the subdivision applicable to count 6 as (c)(1), rather than (e)(1). This is an obvious typographical error: Section 243, subdivision (c)(1) applies to battery against a peace officer, not a domestic partner, and the verdict form for count 6 specifies that defendant committed battery against "JANE DOE, a person with whom defendant has a dating/engagement relationship." The abstract of judgment likewise indicates that defendant was convicted of a violation of section 243, subdivision (c)(1). We shall order the abstract of judgment corrected to reflect a conviction of section 243, subdivision (e)(1).

V. Restitution for Parking Tickets

A. Background

Doe testified at trial that defendant had been using one of her cars for several months. On June 21, the day defendant punched Doe in the stomach, he texted her to ask what she wanted him to do with the car. Doe explained that around that time, she had been telling defendant she did not want anything to do with him and she wanted her car back. He had been accruing parking tickets and refused to pay for them, and she wanted to sell the car and pay off the tickets.

Doe spoke with defendant at 7:00 on the morning of June 27, 2016, after he raped her and she left his house. During the conversation, she told him she did not want him to drive her car anymore and that she would report the car as stolen if he did not return it to her. Defendant told her he would return the car if she replaced an Xbox that had been damaged during the struggle between the two of them. She did not report the car as stolen immediately, because a detective advised her not to do so while officers were trying to bring defendant in for questioning.

Doe testified she had paid more than $600 for the tickets at the time of trial, and she was still paying them off. After trial, she submitted a restitution claim for $1,445 in parking tickets, and the trial court awarded that amount in victim restitution.

B. Analysis

Defendant contends this restitution award is improper because his criminal conduct did not cause Doe's losses. We review an award of victim restitution for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.)

Section 1202.4, subdivision (a)(1) provides that "a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." "To that end, section 1202.4 provides that, with certain exceptions not relevant here, 'in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims.' (*Id*., subd. (f).) The statute further provides that the court's restitution order shall, '[t]o the extent possible . . . fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct.' (*Id*., subd. (f)(3).) This provision, as the Courts of Appeal have uniformly held, . . . authorizes trial courts to order direct victim restitution for those losses incurred *as a result of the crime of which the defendant was convicted*." (*People v. Martinez* (2017) 2 Cal.5th 1093, 1100-1101 (*Martinez*), italics added; accord, *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 (*Lai*) ["the reimbursable loss identified by section 1202.4, subdivision (a)(1) is the loss resulting from the crime of which the defendant was convicted"]; *People v. Woods* (2008) 161 Cal.App.4th 1045, 1049.)

As explained in *Martinez* and *Lai*, the scope of permissible restitution is narrower when a defendant is sentenced to prison than when restitution is imposed as a condition of probation: " 'California courts have long interpreted the trial court's discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction. Under certain circumstances, restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation].' " (*Lai*, *supra*, 138 Cal.App.4th at pp. 1247-1248; accord, *Martinez*, *supra*, 2 Cal.5th at pp. 1101-1102.)

This rule, however, does not apply when the court imposes a state prison sentence. (*Lai*, *supra*, 138 Cal.App.4th at p. 1248.) In those circumstances, the appellate court in *Lai* concluded section 1202.4 did not support the portion of a restitution order attributable to welfare aid that was fraudulently obtained before the period encompassing the crimes of which the defendant was convicted. (*Id*. at pp. 1246, 1249.) In *Martinez*, our high court concluded that a court imposing a sentence for leaving the scene of an accident (Veh. Code, § 20001, subd. (a)) could not order restitution for injuries the victim suffered from the underlying collision, but only those that were caused or exacerbated by the defendant's criminal conduct in fleeing the scene of an accident without rendering aid. (*Martinez*, *supra*, 2 Cal.5th at pp. 1097-1098, 1107.) For instance, if the flight led to a delay in medical care for the victim and the victim's injuries were exacerbated as a result, those injuries would be a result of the commission of the crime. And similarly, the cost of tracking down a defendant who fled the scene of an accident might be recoverable because it resulted from the defendant's unlawful flight. (*Id*. at p. 1107.)

Applying these standards, we conclude the restitution award was excessive. Doe testified that before the crimes, defendant had been accruing parking tickets, and the documentation Doe provided indicates that almost all of the tickets were issued *before* defendant committed the crimes of which he was convicted. These tickets, and Doe's resulting losses, were not the result of defendant's criminal acts in committing rape and

domestic battery, and restitution under section 1202.4 is not available. The documentation shows, however, at least one ticket that was issued after the crimes, during the time that Doe was refraining from reporting the car as stolen on the advice of a detective investigating this case. That loss may reasonably be seen as resulting from defendant's criminal conduct for purposes of section 1202.4. (See *Martinez*, *supra*, 2 Cal.5th at p. 1107 [cost of tracking down defendant who has fled scene may be recoverable].)

The Attorney General argues the entire restitution award is proper because defendant was using Doe's car during the period in which he committed rape and domestic battery against her, Doe complained about the tickets and told him to return the car, and he kept her car in order to wield control over her. While these facts might support a restitution award under the broader standards applicable to a probation order, they do not show that defendant's criminal conduct caused the majority of Doe's losses.

We shall remand the matter for the trial court to recalculate the restitution award under these standards.

DISPOSITION

The matter is remanded to the trial court to (1) strike the three-year determinate term for count 1; (2) correct the minutes of the May 9, 2017 sentencing hearing and the abstract of judgment to omit the concurrent 15-year-to-life term for count 1; (3) correct the abstract of judgment to reflect a conviction of section 243, subdivision (e)(1) for count 6; and (4) recalculate the restitution award in accordance with the views expressed in this opinion. The clerk of the court shall then forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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BROWN, J.